

8/22/2013

DOE contact for Bainbridge

Barbara Nightingale

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425-649-4309

Objection: In 2012 and 2013 Bainbridge failed to properly involve citizens in the SMP planning process by excluding Chapter 7.0 VIOLATIONS, ENFORCEMENT, AND PENALTIES from the normal planning process and excluding Chapter 7 from the Citizen Work Groups, citizens Task Force, Planning Commission, and Planning Commission public hearing.

COBI keeps making the same mistakes!

In 1999 the City of Bainbridge Island lost the attached case for failing to properly involve the citizens in the planning process for the Winslow Master Plan.

**CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD
ANDRUS v. CITY OF BAINBRIDGE ISLAND, Case No. 98-3-0030**

Citizen participation in all phases of the planning process is required by RCW 36.70A.020. Bainbridge failed to properly involve citizens in the SMP planning process.

Objection: Bainbridge's failure to prepare responses to citizen comments and questions is a failure to involve the citizens in the planning process as required RCW 36.70A.020, the SMA and the DOE Guidelines.

Staff responses to SMP comments provided in the City Council comment matrix and sent to the DOE. http://www.ci.bainbridge-island.wa.us/documents/pln/shoreline/smpupdate/cccomments/6/comments_to_city_council_052813pdf.pdf

Of the thousands of comments submitted to the City regarding the SMP, staff chose to include only 553 and the city's responses to 345 was "Comment noted"

This Matrix dated 5/28/13 was sent to the DOE as part of the city's submission to the DOE.

It appears that comments from Gary Tripp, Bainbridge Defense Fund, Bainbridge Shoreline Homeowners, attorney Dennis Reynolds, retired attorney Linda Young, Don Flora, PhD, and many citizens comments were not given to the DOE as part of the city's original DOE submission package on or about 6/10/13.

The city prepared **no responses** to the very substantive comments, suggested changes, questions, and the signed petition the city received.

Objection: Bainbridge's SMP package submitted on or about 6/10/13 was incomplete because it did not contain all comments submitted to COBI during the SMP review process. If COBI later submitted additional comments, then the DOE must restart the review process, including the public notice and public hearing. There is no provision in WAC 173-26-110 to allow COBI to make an incomplete submission to the DOE and then at some later date try to complete the submission by presenting additional material while retaining the earlier incomplete submission date as the date of submission.

The DOE is similarly barred from starting the review process prior to receiving a complete SMP package from COBI. The DOE also can not begin the review process prior to receiving a complete package from COBI, nor can it give public notice, or hold a public hearing to receive public comments prior to receiving a complete package from COBI.

After the DOE receives a complete package from COBI, the DOE may restart the review process from the very beginning.

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Bainbridge's SMP Exceeds the City's Authority

8/22/2013

To the DOE

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Barbara Nightingale

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Gary Tripp and the members of the Bainbridge Defense Fund object to the City of Bainbridge Island's SMP for the following reasons:

The City lacks the authority:

1. To pass an SMP and send it to the DOE for review without holding a Public Hearing and allowing public comment on the final version of the SMP.
2. To classify existing developed single-family residences and platted residential lots in Shoreline Residential Conservancy as water-enjoyment and water-related and not suitable for the "more intense use" of water-dependent.
3. To prohibit motorized water craft usage in its waters absence of demonstrated and documented damage being done by motorized water craft.
4. To ban docks, floats and marine railways on the outside of the Island.
5. To ban docks, floats and marine railways in Priority Aquatic.
6. To prohibit the use of pesticides.
7. To prohibit appurtenant residential structures in Priority Aquatic uplands.
8. To require trees and bushes in revegetated buffers, thus blocking "marine views."
9. To restrict normal residential use over large portions of small residential lots for "revegetation" and forced restoration on private residential property.
10. To designate private property in Shoreline Residential Conservancy for restoration.
11. To require buffers on shoreline private property, which are by their size, designed to mitigate for upland stormwater and upland uses.
12. To require restoration of shoreline vegetation not related to mitigating new impacts of use and development.
13. To limit the time period when bulkheads, docks, and residences maybe be repaired, or the percentage of repair that can be performed.
14. To require a conditional use permit for stairs to access the beach and normal residential uses.
15. To require excessive and costly professional reports as a condition for permits for normal and usual residential uses.
16. To limit one buoy to one every 100 feet, which will eliminate the right of smaller lots to have a buoy and access to the waters of the state.

17. To presume without any evidence that existing and planned residential development is guilty of harming the environment until the property owner proves that the use is not harming the environment.
18. To cite and rely on studies of commercial and industrial uses that are not relevant for low-intensity residential uses as a basis for establishing buffer sizes for single-family residential use.
19. To not cite and rely on scientific studies of "normal protective residential bulkheads" as basis for restrictions and regulations of bulkheads.
20. To prohibit the development of small residential lots on which the owner has been paying property taxes as residential lots for all these years. And,
21. To not use relevant, reproducible, and peer-reviewed scientific studies as the basis for regulations and decision making.

Neither DOE nor the City of Bainbridge Island has the authority to ban "normal protective bulkheads" used to protect land and property from damage and loss by erosion of any kind.

Neither DOE nor the City of Bainbridge Island has the authority to require property owners to first construct a soft bulkhead, which has not been shown to be effective to protect property from erosion in similar situations, at great expense, delaying the needed protection and thereby causing the further loss of property, before issuing a permit for a "normal protective bulkhead."

The DOE has failed to follow its own Guidelines by not investigating Linda Young, Gary Tripp and Bainbridge Defense Funds' claim and accompanying evidence that the Bainbridge SMP containing substantive changes was not submitted for the required Public Hearing and comment period.

The DOE has an affirmative obligation, when it is notified that the final version of Bainbridge's SMP was not submitted to a Public Hearing and the public was not given an opportunity to comment on said final version, to investigate and make a determination whether or not such claim is true and the SMP was not properly prepared, before the DOE proceeds with its Public Hearing and review process. This has not been done and yet the DOE is proceeding with its Public Hearing and review process as if it has.

Bainbridge Defense Fund

Protecting Your Home

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The SMA embodies a legislatively-determined and voter-approved balance between protection of state shorelines and development. The State has developed shorelines through improvement of parks and ramps, construction of bulkheads, ferry docks, etc. As part of our careful management of shorelines, property owners are also allowed to construct water-dependent facilities such as single-family residences, bulkheads, and docks.

Objection: The SMP effectively bans docks, recreational floats, marine railroads, boathouses, and limits buoys all without a scientific showing that these low-intensity recreational uses and appurtenances associated with single-family residences are causing any harm' and with no opportunity to mitigate any new impacts. This is contrary to the balanced approach of use and protection provided for in the SMA.

This ban on water-dependent uses is accomplished in three ways:

1. Over classification / designation of shoreline areas as rare and pristine natural environments in need of special protection from human use. Aquatic Priority, Shoreline Residential Conservancy, Island Conservancy, and Natural.
 - a. These areas on Bainbridge are already developed (except for parks) with homes, docks, and residential uses.
 - b. None of these areas are in their natural state.
 - c. None of these areas are home to rare or unique species. And,
 - d. There is no evidence that current uses will lead to a net loss biological function.
2. Dock repair is under Nonconforming uses, thereby classifying all docks, recreational floats, marine railroads and boathouses as Nonconforming and limiting repairs to 50% every 5 years, thereby eliminating the use over time.
3. Limiting access to the beach and waters of the state by:
 - a. Limiting stairs to 250 sq. ft., or conditional use permit, or a tram which is five time the cost, 100 times the maintenance, and half the functionality as stairs;
 - b. Requiring a bulkhead before a stair permit will be issued;
 - c. Limiting buoys to one per 100 feet when many lots are 50 feet; And,
 - d. Limiting access to the beach to one four-foot path.

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The Draft SMP violates the *WAC 173 26 221(5)(a)* "*Like other master program provisions, vegetation conservation standards do not apply retroactively to existing uses and structures...*" by applying buffers and setbacks to existing development greater than that needed to mitigate **new impacts.**

Objection: Bainbridge's SMP retroactively applies the new buffers and setbacks to existing development in the sections dealing with "revegetation," the Single-Family Mitigation Manual, and rebuilding homes and appurtenances in their existing footprint.

Objection: Bainbridge's SMP forces restoration on private property. The forced restoration is not proportional to the new impacts of use.

Objection: Bainbridge's SMP retroactively applies restriction of the new shoreline designations (Aquatic Priority, Shoreline Residential Conservancy, Island Conservancy and Natural) to existing development, including docks, recreational floats, marine railroads, boathouse, and appurtenances, including accessory dwelling units.

If the new buffers, setbacks and restrictions on overwater structures are not applied to existing development then they are Conforming. This applies to **yards, landscaping and all appurtenances, not just primary appurtenances.**

Bainbridge cannot require "revegetation" for normal residential uses like gardening, changes in landscaping, repairs and unspecified "activities" or even for remodeling or rebuilding homes and appurtenances because these do not cause a net loss of ecological function.

Any requirement to mitigate the new impacts of development must have nexus with the impact and be proportional to new impact. The requirements of the SMP are neither.

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The SMA requires “science” be used – not the lesser standard of Best Available Science.

**RCW 90.58.100 Programs as constituting use regulations--Duties
when preparing programs and amendments thereto--Program contents. (1)**

.....

(a) Utilize a systematic interdisciplinary approach which will insure the
integrated use of the natural and social sciences and the environmental design

Objection: Bainbridge did not use current relevant local “science” as the basis for buffers and setbacks or restrictions on docks, floats, marine railways, buoys, and bulkheads.

At DOE’s Bainbridge SMP Hearing I asked four questions but I see I am not going to get any response before the comment period is over. That is wrong; the questions should be answered when they are received, so that I and others could incorporate the answers into our comments.

My questions were:

1. What residential communities were used to determine the impact of residential uses on tidal waters and the environment?
2. What scientific studies of juvenile salmon diet in Puget Sound show a lack of adequate food supply?
3. What scientific studies of residential uses were used to determined buffer sizes?
And,
4. What scientific studies of “normal protective bulkheads” located at the OHWM in Puget Sound were used to show that bulkheads damage the shoreline and environment?

The answer to these four questions is **none**.

The DOE’s hearing, questions asked by the public, comments received from the public, the city’s response to comments, and the DOE’s review and response to comments, are all part of the **planning process**. The DOE is negligent by not answering these questions.

Objection: The DOE has not responded in a timely manner to the questions listed above, or to others questions asked at the public hearing and in emails sent to DOE, and therefore, has violated the procedural requirements to involve citizens in the planning process. Without the requested answers, I and others are deprived of the ability to effectively respond during the public comment period, and effectively barred from participation in the planning process, all because of DOE's refusal to answer questions prior to the end of the comment period.

Corrective Action: The DOE should provide full and complete answers to the questions asked and reopen the comment period so citizens can respond to the information provided by the DOE.

Science must be numeric, testable, current and relevant. If not, then it is just an unproven hypothesis. Hypothesis may be a basis considered on BAS but it does not qualify as "science."

The best science is peer reviewed and published. Even if it is peer reviewed and/or published if it is not numeric, testable, current and relevant, it is still not science.

Science uses the Scientific Method:

1. Observation of a phenomenon;
2. Clear statement of a hypothesis that may perhaps explain that phenomenon; and,
3. Development of tests to disprove or falsify predictions based upon the hypothesis.

Objection: Bainbridge did not use science as required by the SMA or the scientific method to determine buffers and setbacks or restrictions on bulkheads, docks and overwater structures.

Buffers necessary to contain pollutants from a cattle feed-yard and row-crops are not a relevant measure for buffers to necessary to contain pollution from residential use. Individual residential uses do not produce measurable pollution requiring a buffer.

Buffers necessary to contain sediment from clear-cut logging practices and provide shade for small streams are not a good measure for buffers to contain sediment and provide shade from residential development and use. Best Management Practices may be used to manage sediment during construction, which is a short-term event not requiring a permanent buffer.

Would you consider buffers necessary to contain chemical fertilizers and pesticides from row crop industrial farming a good measure for preventing chemicals from low intensity residential use?

Basic buffer science starts with identification of the source of pollution. Bainbridge has never identified a source of pollution. The second step is measurement of pollution to

identify the size of a buffer or method needed to remediate the pollution. Bainbridge has never measured any pollution from low-density residential use.

In fact Bainbridge has never done an assessment of the health of its shoreline so its condition can be measured over time. When the current 1996 SMP was passed no assessment of the shoreline health was prepared, so 17 years later the city has no idea how well the SMP is working. From a waterfront property owner's perspective, I can say that in my section of the Island the SMP has worked well in protecting the shoreline health. I have heard no reports of decline in the ecosystem health that could be associated with low-intensity residential use. Now the City is proposing a new huge SMP and still has no assessment of the health of its shoreline.

It is illegal for Bainbridge to use generalized buffer studies or attempt to estimate what it would take to restore the shoreline and the ecosystem of its prehuman condition, and use these to create prescriptive buffers to apply to all residential properties.

It is illegal for Bainbridge to use buffers and setbacks to create **wildlife habitat on private property**, which is not the direct mitigation of new uses.

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Objection: SMP policy is designed to block and obscure marine views from public and private property.

Bainbridge's current SMP

G. Public Access – Visual and Physical

14. Shoreline and water views from public upland areas should be preserved

Draft SMP

4.1.2.5 Regulations – Revegetation Standards

4. When vegetation mitigation is required for new upland development, uses, or activities the mitigation plan shall include new plantings that are protective of views from the primary structure of the subject property and in proportion to the identified impact.

a. Within Zone 1, plant vegetation to obtain a minimum of 65% native vegetation canopy coverage;

5. (c) Include plantings equivalent to one tree per ever 20 linear feet of shoreline and one shrub per ever five linear feet, which may be planted with due consideration of views from the primary structure.

Result: While a reference is made to plantings that are “protective of views from the primary structure”, and “due consideration of views from the primary structure, any trees planted on the shoreline will necessarily block views from the residence, the adjacent properties lateral views of the water, and the public’s view of the water from the roadways. Trees planted every 20 feet and bushes planted every five feet will block all view of the water.

Houses without beautiful open views will lose value. The public will lose scenic marine vistas and we will all be the poorer for it.

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We object to Bainbridge's Draft SMP because it classifies single-family residences and their appurtenances as not water-dependent uses in violation of the SMA.

In June 1971, the Washington State Legislature approved a comprehensive regulatory program for shorelines of the state with the adoption of the Shoreline Management Act of 1971 ("SMA" or "Act"). The Act carried with it provisions for a vote by the people and in November 1972, the people of the State of Washington enacted the Shoreline Management Act (Chapter 90.58 RCW). The Act's paramount objectives are to protect and restore the valuable natural resources that shoreline represent, and to plan for and foster all "reasonable and appropriate uses," including single-family development, that are dependent upon a waterfront location or that offer the opportunities for the public to enjoy the state's shorelines.

SMA page 4

To this end uses shall be preferred which are consistent with control of pollution and prevention of damage to the natural environment, or are unique to or dependent upon use of the state's shoreline. Alterations of the natural condition of the shorelines of the state, in those limited instances when authorized, shall be given priority for single family residences and their appurtenant structures, ports, shoreline recreational uses

SMP

1.5 Master Goal

Shoreline Management Act, the Shoreline Master Program Guidelines, and the Growth Management Act, giving preference to water-dependent and water-related uses

3.2.1.3 Management Policies

1. Priority should be given to the following uses in order of preference: water-dependent, water-related, and water-enjoyment uses.

Background: 92% of Bainbridge's shoreline is already developed primarily with single-family residences and 100% of the shoreline is platted into lots for residential development or commercial use.

Yes in one section it indicates the single-family residences is a water-dependent use and in another section the SMP reclassifies existing single-family residences and residential lots as only suitable for water-related or water-enjoyment uses and not suitable for the more intense use of water-dependent..

Objection:

Shoreline Residential Conservancy is not a designation listed in the DOE Guideline. It confuses two concepts and uses - residential and conservation - and says it is suitable for restoration on private land. **Restoration is not permitted or to be planned for on private property.**

The authorization in the DOE Guidelines to create more than one residential shoreline designation was intended to allow jurisdictions to create a distinction between single family and multifamily zones. Bainbridge's current SMP allows multifamily in Urban and Semi-rural but not in Rural.

Shoreline Residential Conservancy designated e

3.2.3 Shoreline Residential Conservancy**3.2.3.2 Designation Criteria**

Areas to be designated Shoreline Residential Conservancy should include the following criteria:

1. Areas that are appropriate and planned for water-related or water-enjoyment uses that are compatible with maintaining or restoring ecological functions and processes; or
2. Areas that are not generally suitable for commercial/industrial water-dependent uses or more intensive uses due to the potential impacts these uses may have on the existing shoreline characteristics; and one or more of the following criteria:

All of the areas designated as Shoreline Residential Conservancy are fully developed as residential lots and should be designated as Shoreline Residential.

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Objection: The SMP illegally takes ownership and control of large portions of waterfront property by requiring a permanent vegetation easement on the title. Such an easement and the easement's dimensions and restriction are not to mitigate the new direct impacts from development but to create wildlife habitat and environmental zone for public benefit.

Objection: Placing a permanent vegetation "easement" is not proportional to the new impacts of development.

Objection: There is no nexus between requiring an easement be placed on the title and impacts from residential development.

Objection: Placing a permanent vegetation easement on property, which removes and prohibits normal residential uses such as; recreation, gardening, gathering for social events, and children and pets play areas, is a taking of property for public use of wildlife habitat and open space. These restrictions have no nexus with the new impacts of residential development or redevelopment.

Objection: The SMP illegally requires the property owner, in exchange for a building permit, to forever give up their constitutional right to protect their property from erosion and loss by use of a normal protective bulkhead.

These are all violations of *Nolan, Dolan & Koontz*

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 - a. These areas on Bainbridge are already developed (except for parks) with homes, docks, and residential uses.
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2. Dock repair is under Nonconforming uses, thereby classifying all docks, recreational floats, marine railroads and boathouses as Nonconforming and limiting repairs to 50% every 5 years, thereby eliminating the use over time.
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 - a. Limiting stairs to 250 sq. ft., or conditional use permit, or a tram which is five time the cost, 100 times the maintenance, and half the functionality as stairs;
 - b. Requiring a bulkhead before a stair permit will be issued;
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Objection to the SMP: Bainbridge and the DOE's restrictions and/or prohibitions on protecting private property from erosion in a timely, proven, and effective manner are unconstitutional.

Bainbridge and DOE violate state and federal law and constitutional guarantees by restricting and/or prohibiting bulkheads needed to protect the single family residences, their appurtenances, and the land on which they sit by:

1. Requiring that the primary structure (the Single-Family Residence) or primary appurtenances (not defined) be within three to five years of damage from erosion before issuing a permit for a normal protective bulkhead.
2. Not allowing bulkheads to protect all appurtenances. And,
3. Not allowing bulkheads to protect land.

SMP violates the right to own and use private property:

The City and the DOE cannot, through regulation force or cause a property owner to contribute his property as sediment to the beach for a common good. This violates the rights of private property owners to own, enjoy and sell private property, because if property is eroded the owner can no longer use, enjoy or sell his property.

The requirement is disproportional to the alleged harm:

The City and the DOE requirement that a property owner allow his property and some appurtenances to be destroyed and eroded is disproportionate to the impact of the bulkhead. The DOE asserts that a bulkhead will cut off the flow of sediment needed by the beach. The City and the DOE approved mitigation for this cut off of sediment is to add "fish mix" gravel to the beach every five years. This alleged harm is disproportionate to the very large real harm of the permanent loss of property, its use and the ability to sell the property.

SMP is designed to eliminate existing bulkheads:

The SMP limits the repair of bulkheads to 50% in five years or the bulkhead has to comply with the SMP which prohibits bulkheads unless the primary structure / single family residence or primary appurtenance is in danger of being damaged or destroyed within three to five years.

If a bulkhead is damaged, that by itself is proof that a bulkhead is needed to protect the property.

Requiring the use of soft bulkheads violates the SMA

The SMP violates the SMA by:

1. Prohibiting "normal protective bulkheads" unless the residence or primary appurtenance is in danger of being damaged in three to five years.
2. Not allowing bulkheads to protect appurtenances other than those called "primary appurtenances". Primary appurtenances are not defined, but if there are primary appurtenances then there must be non-primary appurtenances for which the protection of a bulkhead is not allowed.
3. Requiring property owners to try using soft bulkheads which in most circumstances have been shown not to be "effective".
4. Requires property owners to try using soft bulkheads and waiting for them to fail before allowing a normal protective bulkheads is not a "timely" response to the need for bulkhead.
5. Requires property owners to try using soft bulkheads first wastes money and resources The decision should be made using engineering standards on ideological view points. And,
6. Requiring that all SMPs contain methods to achieve "effective" and "timely" protection for shoreline landowners. **This SMP does not.**

SMP does not contain SMA requirement:

There is no preference in the SMP for bulkheads to protect single-family residences occupied prior to January 1, 1992

"The standards shall provide a preference for permit issuance for measures to protect single family residences occupied prior to January 1, 1992, where the proposed measure is designed to minimize harm to the shoreline natural environment."

Bainbridge already lost this case in Biggers V. City of Bainbridge Island

Finding

¶31 The SMA embodies a legislatively-determined and voter-approved balance between protection of state shorelines and development. The State has developed shorelines through improvement of parks and ramps, construction of bulkheads, ferry docks, etc. As part of our careful management of shorelines, property owners are also allowed to construct water-dependent facilities such as single-family residences, bulkheads, and docks.

¶32 The SMA also recognized there is an important function performed by structures that protect shorelines. The legislature's 1992 amendments to the SMA further emphasized this need for certain shoreline structures to provide for the protection of shorelines. This conclusion is illustrated by the SMA's provisions requiring prompt adoption of SMPs and shoreline structure permit processing.

¶33 The SMA contains an express "preference" for issuing such permits. RCW 90.58.100(6). Thus, the SMA also requires that all SMPs contain methods to achieve "effective" and "timely" protection for shoreline landowners. *Id.* SMPs must provide for "the issuance of substantial development permits for shoreline protection, including structural methods such as construction of bulkheads" *Id.* Permit application to local governments must be processed in a timely manner. *See id.*

¶34 A permit for substantial development on shoreline "shall be granted" when development is consistent with the applicable SMP and provisions of the SMA. RCW 90.58.140(2). This is a mandatory provision included in each city-adopted SMP before the Department of Ecology approves: "[e]ach master program *shall* contain standards governing the protection of single family residences and appurtenant structures against damage or loss due to shoreline erosion." RCW 90.58.100(6) (emphasis added).

The SMP violates the SMA:

The SMA explicitly states "[a]lterations of the natural conditions of the shorelines and shorelands **shall be** recognized by the department." RCW 90.58.020. (Emphasis supplied.) Single-family homes and water-dependent uses such as docks are priority uses of the shorelines which fall within allowed alterations of the shorelines.

The SMA requires each local master program to protect "single family residences and appurtenant structures against damage or loss due to shoreline erosion." The provisions of any SMP ". . . shall provide for methods which achieve effective and timely protection against loss or damage to single family residences and appurtenant structures due to shoreline erosion." RCW 90.58.100 (6) (emphasis added), especially structures built before 1991. The SMA requires each local master program to protect "single family residences and appurtenant structures against damage or loss due to shoreline erosion." The provisions of any SMP ". . . *shall* provide for methods which achieve *effective and timely* protection against loss or damage to single family residences and appurtenant structures due to shoreline erosion." RCW 90.58.100 (6) (emphasis added), especially structures built before 1991.

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(3) Procedural terms:

(e) "Substantial development" shall mean any development of which the total cost or fair market value exceeds two thousand five hundred dollars, or any development which materially interferes with the normal public use of the water or shorelines of the state; except that the following shall not be considered substantial developments for the purpose of this chapter:

- (i) Normal maintenance or repair of existing structures or developments, including damage by accident, fire, or elements;
- (ii) Construction of the normal protective bulkhead common to single family

residences;

(iii) **Emergency construction necessary to protect property from damage by the elements;**

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(6) Each master program shall contain standards governing the protection of single family residences and **appurtenant structures against damage or loss due to shoreline erosion**. The standards shall govern the issuance of substantial development permits for shoreline protection, including structural methods such as construction of bulkheads, and nonstructural methods of protection. **The standards shall provide for methods which achieve effective and timely protection against loss or damage to single family residences and appurtenant structures due to shoreline erosion**. The standards shall provide a preference for permit issuance for measures to protect single family residences occupied prior to January 1, 1992, where the proposed measure is designed to minimize harm to the shoreline natural environment. [1995 c 347 § 307; 1992 c 105 § 2; 1991 c 322 § 32; 1971 ex.s. c 286 § 10.

Case Law on Right to Protect Property

It is well established that, under the common law, a property owner has a right to defend his property against the elements. *See Cubbins v. Mississippi River Commission*, 241 U.S. 351, 363-64 (1916) (It is a “universally recognized” that the common law entitles shoreline owners “to construct works for their own protection.”); Joseph J. Kalo, *North Carolina Oceanfront Property and Public Waters and Beaches: the Rights of Littoral Owners in the Twenty-First Century*, 83 N.C. L. Rev. 1427, 1439 (2005) (At common law, “[e]ach landowner had the right to erect structures to protect her land from the ravages of the sea[.]”). And there is nothing in the common law suggesting that this right is inferior to a neighboring property owner’s right to gains (through erosion or accretion) against an abutting property. *Cubbins*, 241 U.S. at 364-65 (A property owner whose interest is affected by a lawful shore defense structure “has no cause of complaint”). To the contrary, the common law has always made the right to protect one’s property from harm paramount. *Id*; *Pechacek v. Hightower*, 269 P.2d 342, 344 (Okla. 1954) (Riparian owner has the absolute right to construct necessary defense structures to maintain or restore a bank without liability to other riparian owners); *Katenkamp v. Union Realty Co.*, 59 P.2d 473, 473-74 (Cal. 1936) (A coastal property owner has the right to erect reasonable defense structures to protect his land from inroads of the sea.); *Cass v. Dicks*, 44 P. 113, 115 (Wash. 1896) (A neighboring land owner has no right to prevent a property owner from constructing defense structures to protect his land from overflow).

The relevant excerpts from briefs in *Luhrs v. Whatcom County*

Opening Brief: Our Supreme Court has recognized that this right to timely and effective protection of single-family residences from shoreline erosion is a protected right that cannot be prohibited without rational justification. *See Biggers v. City of Bainbridge Island*, 162 Wn.2d 683, 702, 706 (2007).

Reply Brief: Our Supreme Court has repeatedly concluded that the SMA intended to strike a balance between the public interest in protecting shorelines and the property rights of shoreline landowners. *See Biggers v. City of Bainbridge Island*, 162 Wn.2d 683, 687 (2007) (the SMA seeks to balance protecting shorelines with the rights of private property owners); *accord Buechel v. State Dep't of Ecology*, 125 Wn.2d 196, 203 (1994); *Nisqually Delta Ass'n v. City of DuPont*, 103 Wn.2d 720, 726 (1985).

Ms. Luhrs has the fundamental right “ ‘to acquire and hold property, *and to protect and defend the same.*’ ” *Am. Legion Post No. 149*, 164 Wn.2d at 607 (emphasis added) (quoting *Grant County Fire Prot. Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 812-13 (2004)); *State v. Vander Houwen*, 163 Wn.2d 25, 36 (2008). While government can adopt reasonable regulations to protect the public interest, it cannot “abrogate a property owner’s constitutional right to protect his property.” *Vander Houwen*, 163 Wn.2d at 36; *Biggers*, 162 Wn.2d at 697 (A complete prohibition on protective bulkheads would “conflict[] with [the] regulatory system established by the SMA.”). Thus, the SMA requires local government to include standards for the construction of a bulkhead to protect one’s home from the threat of loss or damage due to shoreline erosion. RCW 90.58.100(6); *see also Biggers*, 162 Wn.2d at 697-98 (“[T]he SMA also requires that all SMPs contain methods to achieve ‘effective’ and ‘timely’ protection for shoreline landowners.”); *Samson v. City of Bainbridge Island*, __ Wn. App. __, 202 P.3d 334, 341 (2009) (quoting *Biggers*, 162 Wn.2d at 697), *id.* at 344 (shoreline update complied with the SMA where it permitted protective bulkheads);

State Dep't of Ecology v. City of Moses Lake, SHB No. 02-004, 2002 WL 1730022, at *4 (Order on Summary Judgment, July 24, 2002) (“State environmental policy provides protection for single-family residences from ‘damage or loss due to shoreline erosion.’ ”).

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